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CARD 4

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 235.

GENERAL INVESTMENT COMPANY,
Appellant,

vs.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, *et al.*,
Appellees.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR APPELLEES.

STATEMENT.

This suit was commenced in December, 1914, in the Court of Common Pleas for Cuyahoga County, Ohio, for the purpose, broadly, of restraining the then pending consolidation of The Lake Shore and Michigan Southern Railway Company—hereinafter called the Lake Shore, The

New York Central and Hudson River Railroad Company—hereinafter called the New York Central—and certain other railroad corporations.

Objection was made in the Court of Common Pleas to the validity of the service of process upon the New York Central and the case was thereafter removed to the District Court of the United States for the Northern District of Ohio, Eastern Division.

Various steps were taken in the District Court after the removal of the cause including the filing by the New York Central of a renewed motion to set aside the service; by the plaintiff of motions for leave to file a supplemental petition and for substituted service upon the New York Central, and by the Lake Shore, of a motion to dismiss the entire petition upon the ground that with the New York Central dismissed from the cause there was an absence of an indispensable party, as well as upon the usual grounds of no cause of action and the adequacy of legal relief. Thereafter, the plaintiff filed a motion to remand.

The District Court heard the various motions and rendered its decision, denying the motion to remand; granting the motion to quash the service upon the New York Central; denying the motions for leave to file a supplemental petition and for substituted service, and dismissing the cause for the reason that the New York Central was an indispensable party and was not lawfully before the Court.

From the decree of the District Court an appeal was taken to the United States Circuit Court of Appeals for the Sixth Circuit and such appeal was heard and determined. The opinion of the Court covered the various questions presented

upon the appeal. It held (1) that the motion to remand the cause to the State Court had been properly denied; (2) that the New York Central had not been duly served with process; that the New York Central had not appeared voluntarily in the case; that the motions for leave to file supplemental bills and for substituted service had properly been denied and that the motion to dismiss upon the ground that the New York Central having been dismissed from the cause it was left without an indispensable party having been directed to the entire petition was too broad. But it further held in effect that the portions of the petition stating matters as to which the New York Central was an indispensable party were properly out of the case. The same was true with respect to the portions relating to the so-called Read Committee, no service having been attempted upon the members of that Committee.

The effect of the decision of the Circuit Court of Appeals was to affirm the action of the District Court upon the various motions and to strike out of the petition the matters as to which the New York Central and the Read Committee were indispensable parties and to send back to the District Court the remaining portions of the petition for further proceedings "not inconsistent with this opinion."

The attention of the Court is directed at the outset to the fact that the plaintiff upon this appeal bases no assignment of error upon the action of the Circuit Court of Appeals in directing the striking from the petition of the allegations concerning the acts of the New York Central, including the charges of violations of federal and state anti-trust laws. Indeed the plaintiff in its brief

(p. 57) apparently accepts and approves the decision of the Circuit Court of Appeals upon that point.

In sending the case back to the District Court the Circuit Court of Appeals also gave the Lake Shore express permission to move to dismiss so much of the original petition as sought to enjoin it from entering in the proposed consolidation on account the alleged violation of the federal anti-trust act, but, as the appellees contend, did not otherwise control the action of the District Court.

After the case was remanded to the District Court the defendant filed a motion to strike out different portions of the petition and also to dismiss the petition and the motion to dismiss was granted.

The plaintiff took a second appeal to the United States Circuit Court of Appeals which affirmed the decision of the District Court and the plaintiff seeks upon its appeal to this Court to review the questions which were passed upon by the Circuit Court of Appeals in its two decisions.

As stated in the plaintiff's brief the proposed consolidation has been consummated during the pendency of this litigation, "The New York Central Railroad Company" being the name of the consolidated corporation.

The New York Central desires to participate in this brief to the extent only that it seeks to sustain the action of the District Court in dismissing the case as against it for invalid service of process. The New York Central, as it contends, has never appeared in the case since such action was taken and it desires now only to be heard for the special purpose stated. The argument with respect to all other matters will be presented on behalf of the Lake Shore.

For convenience the questions arising upon this appeal will be taken up so far as practicable in the order in which they are examined in the appellant's brief. The parties will be designated respectively as plaintiff and defendant rather than as appellant and appellee.

ARGUMENT.

I.

The motion of the plaintiff to remand the cause was properly denied.

The plaintiff at the time of the commencement of the suit was and now is a corporation under the laws of Maine and an inhabitant of that State. The Lake Shore at the time of the commencement of the suit was a corporation under the laws of Ohio and an inhabitant of that State. The New York Central at said time was a corporation under the laws of New York and an inhabitant of that State. As already stated, the suit was commenced in the Court of Common Pleas of Cuyahoga County, Ohio, and was removed upon the petition of both defendant corporations to the United States District Court for the Northern District of Ohio, Eastern Division.

(1) *The suit arises under the laws of the United States and is within the general jurisdiction of the federal courts.*

The suit is one arising under the laws of the United States. The petition avers (Rec. p. 8) that certain of the transactions complained of

were "in violation of the anti-trust Act of the United States known as the Sherman Act, passed in 1890"; that certain other acts were in violation "of the Sherman Act of Congress", and (Rec. p. 20) that the proposed consolidation sought to be enjoined was "a violation of the Federal so-called Anti-Trust Act and the Clayton Act so-called (said last named being an Act of Congress approved October 15, 1914) and other federal laws". Thus the interpretation and application of the Sherman and Clayton Acts were directly involved.

Being a suit arising under the laws of the United States it came within the general jurisdiction of the federal courts. Section 24 of the Judicial Code provides that the district courts "shall have original jurisdiction of suits of a civil nature at common law or in equity arising under the Constitution or laws of the United States" and the removal act (Judicial Code, Section 28) provides as follows:

> "Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought in any State court may be removed by the defendant or defendants therein to the district court of the United States for he proper district. * * *"

Section 29 of the Code defines the term "proper district" by the provision that whenever any party entitled to remove any suit desires to do so he shall file a petition "for the removal of such

suit into the district court to be held in the district where such suit is pending".

(2) *Distinction between general jurisdiction and venue.*

The plaintiff claims that the clause in Section 28 of the Code, above quoted, providing that a suit arising under the laws of the United States may be removed is so modified by the clause providing that the suit must be "one of which the district courts of the United States are given original jurisdiction by this title" that no suit can be removed to a district court unless it could have been brought originally in that court, and this whether with or without the the consent of the parties. And the plaintiff says that a suit arising under the laws of the United States can be brought only in the district of which the defendant is an inhabitant, referring to Section 51 of the Code, the last two clauses of which read as follows:

> "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Thus with respect to the present case the plaintiff contends that the case was not removable to the Ohio federal court because it could not have commenced originally in that court; that it could not have been so commenced because the New York Central was not an inhabitant of the Ohio

district; that while the Lake Shore might have been sued in such district and might have removed the cause if sued alone, the presence of the New York Central prevented removal.

The difficulty with the plaintiff's contentions is that they ignore the well recognized distinction between a general description of the jurisdiction of the United States courts and a provision designating a particular place where a suit must be brought; a distinction between essential jurisdiction and exemption from process. The argument which the plaintiff makes is precisely the same as the contention stated by Mr. Justice BREWER speaking for this Court in *Matter of Moore*, 209 U. S. 490, 501:

> "The contention is that as this action could not have been originally brought in the Circuit Court for the Eastern District of Missouri by reason of the last provision quoted from §1, it cannot under §2 be removed to that court, as the authorized removal is only of those cases of which by the prior section original jurisdiction is given to the United States Circuit Courts. But this ignores the distinction between the general description of the jurisdiction of the United States courts and the clause naming the particular district in which an action must be brought."

(3) *The defendants by removing the cause waived any objection to the venue.*

The opinion in the *Moore Case, supra*, quotes from many of the decisions of this Court showing the clear distinction between the jurisdiction common to all the district courts of the United States with respect to the subject matter and the charac-

ter of the parties who may sustain suits in such courts and the power of particular courts over particular defendants. And all the decisions hold that where a suit is not within the general jurisdiction of a federal court it cannot hear it at all but that if it be within its general jurisdiction the court may hear the suit if the party *who has the right to object* to the forum accepts it. It has been repeatedly decided that acts prescribing the place where a person may be sued do not effect the general jurisdiction of the courts but confer a personal privilege upon a defendant which he may waive.

> *Interior Construction & Improvement Company* v. *Gibney*, 160 U. S. 217;
> *St. Louis &c. Railway Company* v. *McBride*, 141 U. S. 127;
> *McCormick Harvesting Machine Co.* v. *Walthers*, 134 U. S. 41;
> *Ex parte Schollenberger*, 96 U. S. 369;
> *Gracie* v. *Palmer*, 8 Wheat. 699.

In the *Moore Case, supra*, the suit was commenced in a Missouri state court by a citizen of Illinois against a corporation of Kentucky, and the defendant filed its application for removal to the federal court for the Missouri district. As already stated, this Court pointed out the distinction between the general jurisdiction of the United States courts and the jurisdiction of particular courts and said upon the question of waiver (209 U. S. 490, 496);

> "That the defendant consented to accept the jurisdiction of the United States Court is obvious. It filed a petition for removal from the State to the United States Court. No

clearer expression of its acceptance of the jurisdiction of the latter court could be had."

See also *Western Loan Co.* v. *Butte, etc. Mining Co.*, 210 U. S. 368.

The decisions of the lower federal courts are at variance upon the question whether both plaintiff and defendant must waive the objection to the venue in a case where jurisdiction is dependent upon diversity of citizenship. In *Guaranty Trust Co.* v. *McCabe*, 250 Fed. 699, it was held that as both the parties had the right to object to the venue it was necessary that both should waive the objection. The decision in *Boise Commercial Club* v. *Oregon Short Line R. Co.*, 260 Fed. 769, is to the same effect. Cases holdiong to the contrary are *James* v. *Amarillo City Light etc. Co.*, 251 Fed. 337; *Hohenberg* v. *Mobile Liners*, 245 Fed. 169; *Louisville etc. R. Co.* v. *Western Union Tel. Co.*, 218 Fed. 91.

But whatever may be the rule in cases where jurisdiction is dependent upon diversity of citizenship and where the proper venue may be the residence of either the plaintiff or the defendant there can be no question that in cases arising under the laws of the United States where the designated *locus* is the district of which the defendant is an inhabitant it is for him alone to waive his privilege. The plaintiff has nothing to do with the matter.

In *Guaranty Trust Co.* v. *McCabe, supra*, the Court while holding, as we have pointed out, that in a suit where jurisdiction was dependent upon diversity of citizenship a waiver of objection to the venue was necessary on the part of both parties distinguished such a case from one where an

alien plaintiff sued and where, consequently, there was but one prescribed district, viz: that of which the defendant was an inhabitant. The Court said:

> "The alien plaintiff could select no other, and, if the defendant chose to waive this privilege or right, neither the statute nor any judicial construction thereof conferred upon these alien plaintiffs any right to object."

In *Rubber and Celluloid Harness Trimming Co.* v. *Whiting-Adams Co.*, 210 Fed. 393, it was held that as a suit arising under the laws of the United States could be maintained in the federal court in Massachusetts against a New Jersey corporation unless it objected, such a suit when brought in a Massachusetts state court could be removed by the defendant to such federal court. The Court said:

> "The plaintiff, then, might have brought the suit in this court originally, if it could get service on the defendant within this district, as it has. This court would have retained jurisdiction unless the defendant had objected that it was not being sued in the district of its residence. That it might have raised this objection is of no consequence for the present purpose, since it is the defendant who has invoked the jurisdiction of this court by its petition for removal. This court, being the District Court to be held in the district where the suit was pending before removal, is the District Court 'for the proper district', into which sections 28 and 29 of the Code gave the defendant the right to remove it. The defendant having exercised that right, I am unable to see that section 51 affords the plaintiff any valid ground for objection."

The Court also considered the contention that the plaintiff as well as the defendant had waived any objection to the venue but held, after consideration of the facts, that it had not done so. Nevertheless the Court held that this was immaterial, saying "I am unable to hold that the plaintiff has lost the right to object, but I must overrule its objection."

It is clear from these authorities that while the district courts of the United States have general jurisdiction over suits arising under the laws of the United States—the subject matter being within such jurisdiction—yet that if such a suit be brought against a defendant in a district of which he is not an inhabitant he has a personal privilege (which he may waive) to insist that he is not being sued in a proper district. Similarly it is manifest that if in such a suit there are two defendants, inhabitants of different districts, and it is brought in a district of which one is an inhabitant the court will have complete jurisdiction if both defendants appear and accept the jurisdiction. In such a case the defendant who is sued in the district of which he is not an inhabitant will be regarded as waiving any objection to the venue. Upon the same principles it is equally clear that where a defendant is sued in the State court in a cause arising under the laws of the United States he may invoke the jurisdiction of the district court by removing to it and that this may also be done where there are two defendants—one an inhabitant and the other not —who join in the removal application.

If then this suit had been commenced in the District Court for Ohio the subject matter would have been within the jurisdiction of that court

and it would have been brought in the district of which the Lake Shore was an inhabitant. The New York Central might have objected to the venue. On the other hand, it might have accepted the forum and in that case the court would have had jurisdiction both in the broad and in the narrower sense. And what the New York Central could have done if the suit had been commenced in the district court it could and did do upon the removal of the case into that court. Its waiver of its personal privilege is established in the clearest possible manner—as was expressly held in *Matter of Moore, supra,*—by its joining in the petition for removal.

(4) *The plaintiff as well as the defendants waived any objection to the venue.*

As already pointed out, the question of the waiver of the wrong district in a suit arising under the laws of the United States depends upon the defendant's acts or omissions and not upon those of the plaintiff. In this case the subject matter of the suit was within the general jurisdiction of the United States court to which it was removed; the New York Central which alone had the right to object joined with the Lake Shore in the petition for removal, and the suit was removed *as of right.*

For these reasons it is our contention that the District Judge was right in his opinion (Rec. p. 119) that the cause was properly removed without regard to any act or omission on the part of the plaintiff. And it is equally our contention that the Circuit of Appeals was also correct in holding that the motion to remand was properly denied and in placing its decision upon the ground that

the plaintiff by its acts and omissions had itself invoked the jurisdiction of the United States Court and had waived any right to object to the removal.

The record discloses that the plaintiff through its counsel appeared in the District Court; entered into a stipulation as to the evidence to be used on the motion to quash the service; argued that important question; later filed motions for leave to file a supplemental bill and two additional motions for substituted service, all of which were supported by affidavits and all of which directly *invoked* the exercise of jurisdiction by the District Court. The plaintiff accepted the forum.

The particulars as to the plaintiff's acts in the District Court are as follows:

(1) The case was removed to the District Court on January 8, 1915. Some time thereafter —the precise date does not appear—the attorneys for the plaintiff and the attorneys for the New York Central filed a stipulation in the District Court providing that certain testimony which had been used at the hearing before the Judge of the State Court "may be used herein" (Rec. p. 41).

(2) The plaintiff's counsel argued the motion of the New York Central to set aside the service of the summons directed to it which was decided on June 30, 1915. The plaintiff excepted to the order setting aside the service. (Rec. p. 59).

(3) On August 16, 1915 the plaintiff filed a motion in the District Court for leave to file a supplemental petition and to make new parties defendant (Rec. p. 59). The plaintiff also exhibited the supplemental bill proposed to be filed

and it is printed in the record (Rec. p. 60-67). This supplemental bill is sworn to by Clarence H. Venner, president of the plaintiff corporation, and contains many prayers for relief.

(4) On August 16, 1915 the plaintiff filed a motion for substituted service upon the New York Central (the original attempted service having at that time been set aside by the District Court). The plaintiff also presented an affidavit sworn to by Mr. Venner in support of this motion.

(5) On August 16, 1915 the plaintiff filed a motion for substituted service upon certain corporations and individuals and presented an affidavit in support of such motion.

(6) On October 29, 1915—eight months after the case had been removed, and more than two months after the last of the plaintiff's motions had been filed—it filed its motion to remand.

There could not be a clearer case of waiver than the above facts disclose and the language of this Court in *Matter of Moore*, 209 U. S., 490, 506, already referred to, fits the case with precision. In that case this Court said:

> "As we have seen in this case, the defendant applied for a removal of the case of the Federal Court. Thereby, he is foreclosed from objecting to its jurisdiction. In like manner, after the removal had been ordered, the plaintiff elected to remain in that court, and he is, equally with the defendant, precluded from making objection to its jurisdiction."

It is not necessary that a plaintiff should go so far as to plead to the merits in order to waive

the jurisdiction of the particular court. What the plaintiff did in *Matter of Moore, supra* appears in the statement of the case:

> "The petition and bond were in due form and the case was transferred to the United States Circuit Court. Thereafter and on March 22, 1907 the plaintiff filed in this court an amended petition. On March 25, by stipulation of the parties, the defendant was given time to plead to the plaintiff's amended petition. Three or four times thereafter stipulations for continuances were entered into by the counsel for both sides."

In *Clark* vs. *Southern Pacific Co.*, 175 Fed. 122, 127, the plaintiff merely propounded interrogations to witnesses, obtained a summons to take testimony and send a notice into the depository taken and to be used upon the trial. The court said:

> "The question remains, Have the parties waived the privilege to which they were entitled? That the defendant has done so, by filing its petition for removal, cannot be doubted. * * * * * * * * *
>
> "What is the attitude of the plaintiff? After a copy of the record was filed in this court he propounded interrogatories to witnesses, obtained a commission to take their testimony, and served a written notice upon the defendant that the depositions would be used in this court upon the trial of the cause. It was only after he had thus availed himself of the process of the Court and impliedly consented to its jurisdiction that a motion was filed to remand the cause to the state court."

In this case the plaintiff did far more than to consent impliedly to the jurisdiction of the District Court. It invoked the exercise of the jurisdiction of the District Court by presenting motions to it, and it argued and left to its decision important questions in the case.

Of course the plaintiff is quite correct in pointing out that this Court has held that a joinder of issue "on the merits" amounts to a waiver of improper venue. That was the form which the waiver took in the particular cases. This Court has never held that such joinder is necessary to constitute a waiver.

II.

The New York Central had the right to move to set aside the service after the removal and notwithstanding the decision of the State Court.

The petition for removal states that the petitioners appear "for the purpose of this petition only, and not intending to waive any question of the sufficiency of service or the want of service on them or either of them, but expressly reserving all questions of service, juprisdiction and want of service on them or either of them." It is clear, therefore, that the appearance of the New York Central in the District Court was a special appearance.

The plaintiff contends, however, that if—as we claim was the case—the New York Central by removing the cause accepted the jurisdiction of the District Court it could not thereafter move to set aside the service. It is asserted that such

a course would amount to an acceptance of jurisdiction and then a denial of it.

It is true that the New York Central by joining in the removal of the suit to the District Court, although specially and guardedly, accepted the jurisdiction of that Court to pass upon all the questions in the case. Among those questions was whether the State court had acquired jurisdiction of the person over the New York Central by the attempted service of process upon it. Upon the removal the District Court took the cause as it stood in the State court and had authority to pass upon pleas in abatement and to the jurisdiction, demurrers, motions to set aside service and all other questions which might arise in the case. The position of the New York Central was entirely consistent. Of course, after the removal it could not assert that the suit was pending in the wrong district and it did not do so. It insisted upon, rather than questioned, the power of the Disrict Court to determine all phases of the case.

In *Goldey* v. *Morning News*, 156 U. S. 518, 525, 526, where the contentions made in a removal case were the same as those made here Mr. Justice BREWER said:

> "As the defendant's right of removal into the Circuit Court of the United States can only be exercised by filing the petition for removal in the State Court before or at the time when he is required to plead in that court to the jurisdiction or in abatement, it necessarily follows that, whether the petition for removal and such a plea are filed together at that time in the State Court, or the petition for removal is filed before that time and the plea is seasonably filed in the Circuit Court of the United States after the removal,

the plea to the jurisdiction or in abatement can only be tried and determined in the Circuit Court of the United States.

"Although the suit must be actually pending in the state court before it can be removed, its removal into the Circuit Court of the United States does not admit that it was rightfully pending in the state court, or that the defendant could have been compelled to answer therein; but enables the defendant to avail himself in the Circuit Court of the United States of any and every defense, duly and seasonably reserved and pleaded to the action, 'in the same manner as if it had been originally commenced in said circuit court.'"

"The necessary conclusion appears to this court to be that the defendant's right to object to the insufficiency of the service of the summons was not waived by filing the petition for removal in the guarded form in which it was drawn up, and by obtaining a removal accordingly."

In *Wabash Western R. Co.* v. *Brow*, 164 U. S. 271 it was held that the filing by a defendant of a petition for removal even without a special appearance for the sole purpose of presenting the petition, did not prevent him after removal from moving in the federal court to dismiss for want of jurisdiction of the person of the defendant.

In *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437, this Court discussed the decision in *Wabash Railway Co.* v. *Brow, supra*, saying (p. 445):

"The Court of Appeals for the Sixth Circuit held that the filing of the petition for removal, in general terms, had effected the

appearance of the Wabash Western Railway Company to the action. This Court, in an opinion by Mr. Chief Justice FULLER, held that the record disclosed that the corporation at the time of the attempted service was neither incorporated nor doing business nor hand any agent nor property within the State of Michigan, and that the individual upon whom service had been attempted was not the agent or an officer of the corporation, and, therefore, no jurisdiction was acquired over theperson of the defendant by the attempted service; and, further, that the petition for removal did not affect an appearance in the case, consequently reversing the judgment of the Circuit Court of Appeals and remanding the case to the Circuit Court, with directions to grant a new trial, and to sustain the motion to set aside the service and dismiss the action."

In *Cain* v. *Commercial Publishing Company*, 232 U. S. 124, this Court considered the contention that Secs. 29 and 38 of the Judicial Code should institute a new and more expeditious practice with the effect of preventing the presentation to the district courts in removal cases of objections to the service of process. But the Court through Mr. Justice MCKENNA said (p. 132):

It may be conceded that the purpose of the amendment was to secure expedition in the disposition of the case, but a revolution in the practice and efficacy of the right of removal is not lightly to be inferred. And a revolution it would be. It would take from the Federal Courts the power they have possessed under the cases cited, a power not only to pass upon the merits of the case but

upon the validity of the service of process, that is, upon the question of jurisdiction over the person of the defendant. How essential this power is to the right of removal is obvious. Without it a State could prescribe any process or notice or a plaintiff, as in the pending case, serve process on a person having no relation with a defendant and compel him to submit to it and to a jurisdiction not of his residence, or give up his right to take the case to what in contemplation of law may be a more impartial tribunal for the determination of the action instituted against him and which it is the purpose of the removal proceedings to secure to him, and, it must be assumed, completely, not by surrender of any of his rights but in protection and security of all of them."

Upon these authorities it is entirely clear that the New York Central had a perfect right to bring up in the District Court after the removal of the cause the question of the sufficiency of the service of process.

It is also settled that sufficiency of the service of process can be questioned after removal to a federal court notwithstanding a decision of the State court sustaining such service; that the sheriff's return is not regarded as conclusive and that the question of jurisdiction is one for ultimate determination of the United States Court.

In *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 441, 442, 443, above referred to, where a sheriff made a return showing service upon an agent of the defendant corporation at its place of business it was said:

"In a memorandum opinion it is indicated that the learned judge, in the court below, followed a previous ruling in the same court; and it is stated that it is the law of Missouri, as held by its highest court, that in a case of this kind a return of this character is conclusive upon the parties. But it is well settled that, after removal from the state to the Federal court, the moving party has a right to the opinion of the Federal court, not only upon the question of the merits of the case, but as to the validity of the service of process. *Wabash Western Ry. Co.* v. *Brow*, 164 U. S. 271, 278.

It is equally well settled in the Federal jurisdiction that a foreign corporation can be served with process within the State only when it is doing business therein, and that such service must be upon an agent who represents the corporation in its business. * *

III.

The New York Central did not voluntarily appear in the case.

As already pointed out, the New York Central in the petition for removal took great care to enter only a special appearance. It stated that it appeared for the purpose of the petition only and without intending to waive any question of service but expressly reserving such questions (Rec. p. 32). It promptly presented its motion to set aside the attempted service in the District Court stating therein that it appeared for the purposes of the motion only "and not intending to enter its appearance herein" (Rec. p. 54).

The order granting leave to file the motion stated that it appeared solely for the purpose of applying for such permission "and not intending to enter its appearance herein." (Rec. p. 54). It promptly brought on its motion to set aside the service and its motion was granted and it was permitted "to go hence without day." (Rec. p. 59).

And yet the plaintiff on this appeal with apparent seriousness contends that the New York Central entered a general appearance in the case because two things happened:

(1) The stipulation that the testimony taken in the State court upon the motion heard in that court to set aside the service might be used in District Court (a renewed motion for the same purpose having been made therein) fails to provide that the use of such testimony shall be limited to the hearing upon the motion to set aside the service.

(2) A brief filed in behalf of the Lake Shore upon the motion to remand is signed by the attorneys as "Solicitors for Defendants" and not "Solicitors for Defendant"—the plural being used instead of the singular.

The contention that by reason of these matters the New York Central notwithstanding its carefully guarded special appearance nevertheless appeared generally illustrates the lengths to which it is possible to go in an attempt to find through a microscopic examination of a record mistakes, no matter how trivial, upon which to base finely spun out claims of error.

The testimony covered by the stipulation had only to do with the question of service and was

taken in that matter in the State court. It was considered by the District Court upon that matter only and the case as to the New York Central was dismissed. The stipulation must, of course, be considered in connection with the obvious purpose which it was intended to accomplish. It would be absurd to say that the New York Central which was endeavoring to be dismissed from the case (and succeeded) intended to do anything more than to arrange for the testimony in support of its motion, and nothing that it did amounted to more.

But the plaintiff says that if the entering into the stipulation constituted a waiver of the plaintiff's right to object to removal it must follow that the New York Central by entering into it entered a general appearance. There is no relation between the two matters. The signing of the stipulation by the plaintiff was one of the acts on its part which showed that it accepted the jurisdiction of the District Court. The signing of the stipulation by the New York Central was well within the scope of its special appearance; it related to the purpose for which it had specially appeared.

The plaintiff's claim concerning the brief is equally trivial. The brief in question was filed four months after the New York Central had gone out of the case. It was filed in two cases presenting similar questions. It purported so far as this case is concerned to be the brief of the Lake Shore alone and was none the less so because some of counsel who had represented the New York Central upon its earlier motion then appeard as counsel for the Lake Shore. The word "defendants" instead of the word "defendant" was used apparently because the brief was in two cases and in

one of them there was a plurality of defendants. But if this were not so and a clerical error had been made it would have been quite immaterial.

IV.

The motion to set aside the service of summons upon the New York Central was properly granted.

In determining in a removed cause whether the service of process was sufficient the federal courts apply their own standard. State statutes providing for service which do not measure up to that standard will not be followed. Consequently in the present case it is only necessary that we should justify the order setting aside the service by the federal rule. It is, however, our contention that the service which was attempted in this case was not even valid according to the State law and so we shall supplement our argument upon the federal rule by a brief discussion of the State requirements.

(1) *The service was insufficient according to the federal rule.*

It is well settled by the decisions of this court that a foreign corporation can be served with process only when it is doing business in the State where the service is attempted, and that such service must be upon an agent who represents the corporation in its business. And there must be an actual doing of business within the State to such an extent as to warrant the inference that the corporaion has subjected itself to the jurisdiction and laws thereof.

St. Clair v. *Cox*, 106 U. S. 350;
Goldey v. *Morning News*, 156 U. S. 518;
Conley v. *Mathieson Alkali Works*, 190 U. S. 406;
Green v. *Chicago etc. R. Co.*, 205 U. S. 530;
Peterson v. *Chicago Railway*, 205 U. S. 364;
St. Louis Southwestern Ry. Co. v. *Alexander*, 227 U. S. 218;
Philadelphia Railway v. *McKibbin*, 243 U. S. 264, 265.

In *St. Louis Southwestern Ry. Co.* v. *Alexander*, *supra*, this Court said through Mr. Justice Day:

> "A long line of decisions in this Court has established that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof."

The following is a statement of the facts showing the *status* of the New York Central with respect to the State of Ohio which follows the lines of that contained in the opinion of the Circuit Court of Appeals upon the first appeal (Rec. p. 112):

The New York Central was a New York corporation owning and operating its railroad extending from New York City to Buffalo New York. It had no railroad in Ohio and maintained no office or place of business in that State, (Rec. 28, 56). Both the New York Central and the Lake Shore were members of a system of railroads included under the general designation, "New

York Central Lines." Each of these railroads ordinarily marked its rolling stock and equipment with its own initials and the words "New York Central Lines"; issued its tickets on paper water marked with those words; printed them on its time-tables; and generally used them as a trade mark, (Rec. p. 47, 50). The same person was president of the New York Central and the Lake Shore. The railroads of the New York Central and the Lake Shore formed a continuous line from New York City to Chicago, extending through Cleveland, in Cuyahoga County, Ohio. Through passenger rates were established over these connecting lines and passenger trains ran over them from Cleveland and western points to New York City without change of cars. The Lake Shore sold coupon tickets for continuous passage over its lines and those of the New York Central to points on the railroad of the latter. These tickets recited that they were issued by the Lake Shore and tnat in selling tickets for passage over other lines it acted only as agent. (Rec. p. 52). They bore at the top the name of the New York Central for the purpose of validating them as authorized tickets issued by the Lake Shore on account of the New York Central. They were honored by the New York Central for the transportation of passengers from Buffalo to the points of destination and upon an accounting the New York Central received from the Lake Shore the proportionate part of the fares collected for the transportation over is lines, and so, reciprocally, as to like tickets issued by the New York Central for transportation to points on the lines of the Lake Shore. The Lake Shore had also, by agreement with other rail-

road companies throughout the country not included in the "New York Central Lines" established through passenger rates to various points on the lines of such other companies, and regularly issued coupon tickets for continuous passage to such points *which were in all respects similar to those issued for passage to points on the New York Central and other "New York Central Lines," bearing likewise the name of the company on whose line the point of destination was located,* and were honored by each other company and accounted and settled for in exactly the same manner as in the case of the New York Central (Rec. p. 46). W. A. Barr, upon whom service was made, was employed as City Ticket Agent of the Lake Shore in its Cleveland office. He was not in the employment of the New York Central, received no compensation from it and did not report or account to it (Rec. p. 55). As such ticket agent he regularly sold coupon tickets, as above described, for passage over the lines not only of the Lake Shore and the New York Central but over practically all the railroads in the country (Rec. p. 43, 46).

Upon these facts it is manifest that the New York Central transacted no business in Ohio and had no agent there. And the relations of the corporations and that which was done through the Lake Shore and its ticket agent in Cleveland were substantially the same as the corporate relations and the methods of transacting business shown in the case of *Peterson* v. *Chicago, Rock Island and Pacific Ry. Co.*, 205 U. S. 364. In that case a domestic (Texas) and a foreign (Illinois) corporation were members of the "Rock Island" system of railroads and that name was used on folders and advertisements. The Illinois Corpor-

ation owned the majority of the stock of the Texas corporation. The local agents of the domestic corporation sold coupon tickets over the line of the foreign corporation and over nearly all other lines in the United States. This court held that the foreign corporation was not doing business in the State where the service was attempted, and that such attempted service upon the ticket agent of the domestic corporation was not sufficient, saying with respect to such ticket agent (p. 394):

> "The ticket agent sold tickets for the Gulf Company, the domestic corporation, in whose employment he was. He would also sell tickets good upon its lines and over the lines of the Pacific Railway, the foreign corporation, but he transacted his business as the agent of the Gulf Company."

In *Philadelphia and Reading Ry. Co.* v. *McKibbin*, 243. U. S. 265, where an attempt was made to serve process upon the Philadelphia and Reading Company by the service of a summons upon its president while passing through New York it appeared that the defendant owned no railroad in the State of New York although it sent cars through that State by connecting carriers; that the Central Railroad of New Jersey was a connecting carrier running to New York City and that tickets were sold by the Central Railroad good over its lines the lines of the Reading Company and other lines. This Court upon these facts, held that the Reading Company was not doing business in the State of New York, saying:

> "The finding that the defendant was doing business within the State of New York is disproved by the facts thus established. The

defendant transacts no business there; except in the sale of coupon tickets. Obviously the sale by a local carrier of through tickets does not involve a doing of business within the State by each of the connecting carriers. If it did, nearly every railroad company in the country would be "doing business" in every state. Even hiring an office, the employment by a foreign railroad of a 'district freight and passenger agent * * * to solicit and procure passengers and freight to be transported over the defendant's line,' and having under his direction 'several clerks and various traveling passenger and freight agents' was held not to constitute 'doing business within the state.' *Green* v. *Chicago, Burlington & Quincy Ry. Co.*, 205 U. S. 530. Nor would the fact if established by competent evidence, that 'subsidiary companies' did business within the State warrant a finding that the defendant did business there. *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.* 205 U. S. 364."

The plaintiff claims, however, that the case of *St. Louis Southwestern Ry. Co.* v. *Alexander*, 227 U. S. 218, supports its contentions. It is clear, however, that that decision is quite in line with the decisions in the other cases. In that case a Texas railroad corporation and a Missouri Railroad corporation comprised what was commonly known as the "Cotton Belt Route" and upon the door of an office in New York was the sign "Cotton Belt Route" and the official pamphlets of the two corporations bracketed them together as constituting such route. An authorized agent of the Texas corporation, as well as of the Missouri corporation used said New York office in negotiations concerning the adjustment of claims and similar

matters and this Court held that such acts of such agent amounted to the transaction of business in behalf of the Texas corporation in New York. The decision was based upon the fact of the actual transaction of the defendant's business in its New York office by its authorized agent. In the present case the New York Central had no authorized agent in Ohio and no office there.

(2) *The service was invalid under the Ohio statute.*

The decisions of this Court as applied to the facts in this case are so very clear that the New York Central was not doing business in Ohio and was not served within the federal rule that it seems unnecessary to proceed with the alternative proposition that the service was invalid under the Ohio statute; if the service were valid under that statute it would not stand in the federal court as against the federal rule. Still, we will briefly examine the State statute and its interpretation.

Section 11, 288 of the General Code of Ohio provides for the service of process upon corporations and the relevant provisions read as follows:

> " * * * If such corporation is a railroad company, whether foreign or domestic * * the summons may be served upon any regular ticket or freight agent of such railroad company or transportation company; or, if there be no such agent, then upon any conductor in charge of any train or car upon such railroad or street railroad, or upon any motorman or any other person in charge of any electric traction car, engine or motor upon

any such electric traction road, in any county in this state, in which such railroad, street railroad, or electric traction road is located, or through which it passes. * * *"

Of course, any application of this statute pre-supposes the existence of an agent in Ohio. If Barr, who was served, was not an officer, agent or employee of the New York Central—and we insist that he was not—then there was no valid service either under the federal rule or the State statute. Assuming, however, for the sake of the argument that he was an agent of the New York Central we come to the interpretation of the statute.

If the concluding provision in the Ohio statute limits the preceding provisions it is manifest that it did not justify the service attempted to be made in this case for the railroad of the New York Central certainly was not located in and did not pass through Cuyahoga County, Ohio. And we would be prepared to show that the history of the statute demonstrates that it should be interpreted to have such effect, notwithstanding any slight changes in punctuation, but as the plaintiff apparently does not press this point we would not be justified in proceeding further with the discussion.

V.

The action of the District Court in denying the plaintiff's motions for leave to file a supplemental bill and for substituted service was right.

In its brief (p. 28) the plaintiff contends that the District Court "erred in refusing leave to

plaintiff to file a supplemental bill and to obtain service under Sec. 57 and the Court of Appeals erred in affirming such refusal."

The first objection to this contention is that there is no assignment of error to support it (Rec. p. 136). The plaintiff apparently recognizes this, for in stating the "Errors Relied Upon" in its brief (p. 12) it attempts to include these alleged errors under the assignment of error relating to the quashing of the service of the summons. Manifestly the matters have no relation. The motion to set aside the service had been granted long before the other motions were made.

The second objection to the plaintiff's contention is that the action of the District Court complained of was in the exercise of its discretion. As said bythe Circuit Court of Appeals in its opinion, the granting or refusal of leave to file a supplemental bill rests in the discretion of the trial court and its action will not be reviewed upon appeal except in the case of a gross abuse of discretion.

Berliner Gramophone Co. v. *Seaman,* 113 Fed. 750, 754,

See also *Chapman* v. *Barney,* 129 U. S. 677;

Gormly v. *Bunyan,* 138 U. S. 623.

The first question to be considered then is whether there was a gross abuse of discretion upon the part of the District Court in denying leave to file a supplemental bill in this case. As already shown, the original petition was directed primarily against a proposed consolidation of several railroad corporations; the New York Central and the Lake Shore being the principal corporations. The petition prayed for an injunction

restraining the consummation of such consolidation and "that if pending this action such consolidation be effected, the same to be set aside (Rec. p. 22). The suit in all its aspects was *in personam*.

The proposed supplemental bill (Rec. p. 60) stated, in substance, the consummation of the proposed consolidation; the execution of a mortgage by the new consolidated corporation; the filing of the consolidation papers and other acts subsequent to the consolidation. The relief prayed for was in substance the quieting of the title to the Lake Shore property in Ohio upon the theory that the consolidation had placed a cloud upon it.

The argument of the plaintiff is apparently that it had the right to turn its *in personam* suit into a suit *in rem;* a suit to remove a cloud on title under the provisions of Section 57 of the Judicial Code which authorizes substituted service in suits "to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought."

But the original petition had no relation to this statute. It was strictly *in personam* and was directed, as we have seen, not only to the enjoining of the proposed consolidation, but to the setting aside of the consolidation if it should be consummated pending the suit. So far as stating the subsequent developments in the matter and as relating to purposes of the original suit the supplemental petition was not at all necessary. And this proposed supplemental bill did far more than to allege "material facts occurring after the former pleading" as permitted by Equity Rule 34. It was a new and distinct suit.

The function of a supplemental bill under the

rule is to present material matters of fact occurring after the filing of the original bill. If the present petition had contained a prayer for relief expressly conditional upon the consummation of the consolidation pending suit it might have been proper to have permitted an amendment stating the fact of the consolidation and containing a prayer that it be set aside. But a supplemental bill cannot set up a new cause of action as is attempted in the present case.

Jenkins v. *International Bank*, 127 U. S. 484,
Mellor v. *Smither*, 114 Fed. 116, 52 C. C. A. 64,
Putney v. *Whitmore*, 66 Fed. 385, 388,
N. Y. Security & Trust Co. v. *Lincoln St. R. Co.*, 74 Fed. 67, 68,8
Smead v. *McCoull, et al.*, 12 Howard 407, 13 L. Ed. 405. See Pg. 420, L. Ed.,
Maynard v. *Green*, 30 Fed. 643,
Electric Co. v. *Brash*, 44 Fed. 602.

If then the proposed supplemental petition stated a cause of action under Section 57 of the Code it was improper supplemental pleading as setting up a new cause of action. And if it failed to state such a cause of action it stated none at all. It is, therefore, important to observe that the supplemental petition fails to allege that the persons and corporations which it seeks to have made defendants claim any right, title or interest in any properties in Ohio.

Moreover, the plaintiff's standing was not such as to entitle it to the exercise of the discretion of the District Court in its favor. It bought five shares of Lake Shore stock out of a total of 499,-

961 shares more than two months after the consolidation agreement had been entered into by the directors of the several companies. At the meeting of the Lake Shore stockholders only 77 shares were voted with the plaintiff against the consolidation, and not even any of the holders of those shares joined the plaintiff in this suit. The granting of the relief prayed for in the supplemental petition would have caused incalcuable injury in a case where, as the Circuit Court of Appeals said, the plaintiff's interest not only approached the irreducible minimum, but such interest had the protection of the Ohio statute affording compensation to dissenting stockholders in consolidation cases.

The denial of the motion for leave to file the supplemental bill necessarily carried with it the motion for substituted service upon the New York Central, for the one was dependent upon the other. The original suit was purely an action *in personam* and did not relate to any property in Ohio which the New York Central claimed.

VI.

A suit cannot be maintained by a private person, whether he be a stockholder or not, to enjoin action upon the ground that it will be in violation of the federal anti-trust statutes.

Whatever doubts may have existed as to the right of a private person to maintain a suit for an injunction to restrain proposed action as involving a violation of the federal anti-trust act has been removed by the decision of this Court

in the case of *Geddes* v. *Anaconda Mining Company*, 254 U. S. 590, 593, where Mr. Justice CLARKE said:

> "With respect to the first contention. It is now the settled law that the remedies provided by the Anti-trust Act of 1890 for enforcing the rights created by it are exclusive and therefore looking only to that Act, a suit, such as we have here, would not now be entertained. *Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 174; *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 471; *United States* v. *Babcock*, 250 U. S. 328, 331. But the law has become thus settled since this suit was commenced in 1911, and the lower courts, upon the allegations in the bill, properly assumed jurisdiction and disposed of the case. *Busch* v. *Jones*, 184 U.S. 598, 599; *Clark* v. *Wooster*, 119 U. S. 322, 326".

There is no ground for distinguishing the case referred to from the present one. Both were suits brought by the minority stockholders of corporations acting in their own right and were based upon alleged violations of the Sherman Anti-trust Act. The only difference is that the Geddes suit was brought to avoid an executed sale and the present suit to enjoin a proposed consolidation and to set it aside if consummated, but that can make no difference in the principles involved. In both cases the corporation in which the plaintiffs were stockholders was a defendant (*Geddes* vs. *Anaconda Mining Co.*, 229 Fed. 129, 130)

Even before the *Geddes* case the decisions of this Court and the lower federal courts afforded no ground for the contention of the plaintiff that a stockholder in a corporation stands in a different position from other persons in seeking to re-

strain violations of the federal anti-trust statutes and may sue upon the theory that they constitute *ultra vires* acts on the part of his corporation.

The *Paine Lumber Case*, 244 U. S. 459, was not a stockholder's suit but precisely the same argument put forward by this plaintiff was urged in the dissenting opinion and the various stockholders' cases were cited. There was just as much basis for granting the plaintiff in that case relief upon generally equitable principles as for granting relief to this plaintiff. The majority opinion however, as we read it, is entirely inconsistent with the plaintiff's position. Had the majority thought that relief could have been granted upon general equitable principles, the decision would necessarily have been the other way.

The *Corn Products Case*, 236 U. S. 165, also was not a stockholder's suit, but what this Court said about the policy of confining the grant of equitable relief under the Sherman Law to suits by the Government applies as well to a suit by a stockholder as to a suit by any other private person.

Exactly the same question upon the same facts as that now presented was passed upon by the New York courts in *Venner* v. *New York Central etc. R. Co.*, 177 App. Div. (N.Y.) 296. In that case Venner, the president of the present plaintiff corporation, brought suit against the present defendants to restrain this very consolidation. The case was substantially identical with the present one, and practically all the questions raised here were considered and passed upon by the New York courts. The suit was dismissed by the New York Supreme Court; the judgment was affirmed by the Appellate Division in the opinion cited above, and was likewise affirmed by the Court of

Appeals (226 N.Y. 583). Certiorari was then denied by this Court (249 U. S. 617). Most elaborate arguments were presented in all the New York courts and also in this Court upon the application for certiorari in support of the same contention as that advanced here, that even if a private person, as a general rule, has no right to sue to retrain threatened violations of the Sherman law a stockholder in a corporation is an exception; that a stockholder may, upon general equitable principles maintain a suit to restrain a consolidation or agreement involving a violation of the federal anti-trust statute because it constitutes an *ultra vires* act. But Judge THOMAS in the Appellate Division said (177 App. Div. (N.Y.) 296, 323):

> "That the plaintiff is not authorized by the Sherman Act to file the present bill accords with the general course of Federal decision." * * * (p. 326) "That the plaintiff may not maintain the action under the Sherman Act appears from the cases cited and also *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165."

Frank v. *Union Pacific R. Co.*, 226 Fed. 906, was also a stockholders' suit. In that case the plaintiffs made practically the same contention as the present plaintiff. They said in their brief (quoted from in the opinion): "The complainants are not seeking to enforce the Sherman law as such, or to usurp the Government's perrogative to break up an unlawful combination by injunction. Their appeal is to the general equity powers of the court." But the Court of Appeals denied this contention and said that it had no authority on behalf of the complaining stockholders to break up the combination alleged to be existing in viola

tion of the Sherman Act between their corporation and another railroad company.

Ketchum vs. *Denver etc. R. Co.*, 248, Fed. 106, was also a stockholders' suit in which the plaintiff attempted to state a case along the lines of the present petition. But the court held that it had no authority to grant relief upon the charge of the violation of the federal anti-trust statute.

In view of these decisions it must be regarded as settled except so far as the legal situation is altered by the Clayton Act (which we shall examine later) that where a combination is found to be existing in violation of the federal anti-trust statutes it is for the public authorities to put an absolute end to it for the benefit of the whole public; that the courts will not pass upon the public questions involved in private suits—whether in the guise of stockholders suits to restrain alleged *ultra vires* acts or other form—nor, after infinite labor, make decisions which may be rendered nugatory by the settlement or withdrawal of the suit and at best determine the matter only as one of private right. And this is most true in the case of great railroad consolidations. The trial of a suit to restrain such a consolidation involves a multiplicity of important questions which should be determined upon the prosecution of the Government alone and ought not to be tried out collaterally in a private suit. The purpose of the law as said by the Court in the *Corn Products Case* "was where a combination or organization was found to be illegally existing to put an end to such illegal existece for all purposes and thus protect the whole public"—an object incompatible with a private suit for private relief whether by a stockholder or any other person.

Courts of equity are not tied down by iron clad rules. The fact that under ordinary conditions they afford relief to a stockholder in case of *ultra vires* acts on the part of his corporation does not compel them to conduct inquiries which should properly be carried on by the Government. If a corporation acts beyond its powers every person interested in it is of course affected. But where the charge is that a consolidation contravenes a public law and the matters involved are essentially public in their nature a court of equity may properly decline to assume jurisdiction and leave the matter to the public authorities. All of which comes down to this: The remedies prescribed in the federal anti-trust statutes for their violation are exclusive; courts of equity are not required to supplement them upon any theory of protecting against breaches of trust or upon any other theory.

VII.

The suit to enjoin the Lake Shore from entering into the proposed consolidation cannot be sustained under the Clayton Act.

The plaintiff repeatedly states in its brief that it is suing as a stockholder, under general equitable principles, to prevent an *ultra vires* act upon the part of its corporation and it insists (Brief, p. 47) that it has the right so to sue without showing any special injury. If this be true the plaintiff is not suing under the Clayton Act and, indeed, is quite clear that while the interpretation and application of the Clayton Act are involved in the case the plaintiff is not basing its action

upon it. The petition does not purport to state a case entitling the plaintiff to sue for injunctive relief based upon its provisions. All that it says is (Rec. p. 20) that the proposed consolidation is a "violation" of the Clayton Act. But as the Clayton Act merely affords a remedy it is difficult we will consider the case as if based upon the Act.

The relevant portion of the Clayton Act is Section 16 which reads as follows:

> "That any person, firm, corporation, or association, shall be entitled to sue for and have injunctive relief, *in any Court of the United States* having jurisdiction over the parties, *against threatened loss or damage* by violation of the anti-trust laws, including sections two, three, seven and eight of this Act, *when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity* under the rules governing such proceedings. * * * (Italics ours).

This Act undoubtedly changes the policy stated by this Court and other tribunals which has already been discussed that suits for injunctive relief against threatened violations of federal anti-trust law can only be instituted by the Government. Any person who comes within the provision of the Clayton Law is entitled to sue for and have injunctive relief. But it equally follows that with respect to any person who does not come within such law the rule of public policy as enunciated by this Court prevails.

(1) *A State Court has no jurisdiction of a suit under the Clayton Act.*

The first reason why the plaintiff is not entitled to sue under the Clayton law is that it brought suit in a State court which was not given jurisdiction by such law. The phrase "Court of the United States" as used in the Clayton law has a well settled meaning. It means a court created under the authority of the Third Article of the Constitution of the United States. Even a territorial court established by Congress is not a Court of the United States. *McAllister* vs. *United States*, 141 U. S. 174, 179. A *fortiori* a State court is not such a court. The Federal Judicial Code (sec. 256) makes this clear: "The jurisdiction vested in the *Courts of the United States* in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several States".

The plaintiff, however, seeks to bring himself within the principle that the State courts have concurrent jurisdiction to enforce rights created by federal statutes where the jurisdiction of the federal court, is not, expressly or by implication, made exclusive.

The principle which the plaintiff states is, of course, well recognized. The Constitution and laws of the United States are as much a part of the laws of every State as its own local laws and Constitution, and the State courts may properly enforce rights created by such national laws unless Congress has indicated that such rights shall be enforced only in the federal courts. When Congress so indicates the jurisdiction of the federal courts is exclusive.

But the Clayton law provision does not create a right at all. It merely affords a remedy, the section being entitled: "Injunctive relief by private parties". While the State courts have jurisdiction to enforce rights created by federal laws they have nothing to do with matters relating merely to the remedy unless such jurisdiction is expressly conferred by Congress. The provision itself by necessary implication makes the jurisdiction of the federal courts exclusive. It says that an injured person "shall be entitled to sue for and have injunctive relief in any Court of the United States having jurisdiction". It gives in express terms power to the federal courts to afford particular relief, and as it does not grant such power to State courts and as they do not have it unless granted the jurisdiction of the federal courts must be exclusive. The statute refers and is limited just as much to the federal courts as if it had said that any aggreived person might sue "in any of the District Courts of the United States having jurisdiction of the parties".

This suit was brought in the Court of Common Pleas for Cuyahoga County, Ohio. That Court had no jurisdiction under the Clayton Act because it was not a Court of the United States and the fact that the case was removed did not alter the situation. In respect of the case before it the federal court has only the jurisdiction of the State Court. The plaintiff was not entitled to bring this suit under the Clayton Act in the jurisdiction in which it brought it, and the objection is just as valid as if the case had never been removed. It is well settled that objections to the jurisdiction of the State court over the subject matter may be taken in a federal court after re-

moval (*Philadelphia, etc. R. Co.* v. *Sherman*, 230 Fed. 814) for the defendant neither gains nor loses by the removal (*De Lima* vs. *Bidwell*, 182 U. S. 1, 174.) And it follows as a corollary that it is no bar to the same objections that the federal court might have had jurirsdiction of the matter if the suit had been originally brought in it.

The present point was raised in the *Venner Case, supra*, 177 A.D. 296, 326, which was brought in a State Court and not removed and Judge THOMAS, after extended consideration, held that the federal anti-trust laws provided within themselves for their enforcement in the federal courts and that the jurisdiction of such courts was exclusive.

(2) *The petition fails to aver loss and damage to the plaintiff as required by the Clayton Act.*

Not only did the plaintiff bring its suit as based upon the Clayton Act in a court without jurisdiction but it failed to aver damage and injury as required by such Act. All that the petition alleges is that the proposed consolidation will constitute "a violation of the Federal so-called Sherman anti-trust Act and the Clayton Act so called"; it wholly fails to allege any special injury or damage to the plaintiff. With the averments concerning the voting of the stock by the New York Central eliminated from the case by the action of the Circuit Court of Appeals now appealed from, there is nothing stating any special damage or injury to the plaintiff as distinguished from any other stockholder of the Lake Shore nor stating any special damage or injury to any stockholder as distinguished from the corporation.

But these averments do not state any special loss or damage to the plaintiff, and that is the thing necessary to be stated. The federal anti-trust laws impose no penalties or forfeitures upon stockholders of corporations which violate such laws. Penalties may be imposed upon the corporations which theoretically may diminish the value of the stockholder's shares, but that is not a special damage to the stockholder of which the violation of the law is the proximate cause; the direct damage is to the corporation itself. And if it be urged that the charters of corporations may be forfeited by violation of federal anti-trust statutes and that thereby the shares of stockholders may be imperiled the answer is that the federal anti-trust statutes impose no such penalties. For these reasons the language of Judge THOMAS in the *Venner Case* (177 A.D. 296) the complaint in which went much further than the present petition in an attempt to state damage and injury to the plaintiff is directly applicable. Judge THOMAS said:

> "But the Clayton Act did not, I infer, tend to allow a private individual to redress a violation of an act merely because it was a violation of public law, but only in case he prove that it 'will cause loss or damage.' He may have a preliminary injunction if he show that the 'danger of irreparable loss or damage is immediate,' but not if he merely show an offense against the United States."
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> * * * * * * * *
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> "But in my judgment the Clayton Act does not enable the stockholder to maintain an action in behalf of the corporation. The general principle that the stockholder must show damage to himself was declared in *Continental Securities Co.* v. *Interborough R.T. Co.*

221 Fed. 44, affirming 207 Fed. 467); *Thomas* v. *Musical Protective Union*, (121 N.Y. 45); *Delavan* v. *N.Y.N.H. & H. R.R. Co.* (154 App. Div. 8). That the plaintiff may not maintain the action under the Sherman Act, appears from the case cited, and also *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.* (236 U.S. 165); and that he may not do so under the Clayton Act without showing damage was decided in *Union Pacific R. Co.* v. *Frank* (226 Fed. 906 (1915) where it is said the Clayton Act would not change the rule that the "right to sue by a private party is only given to obtain injunctive relief against threatened loss or damage,' so that, the opinion continues, the 'loss or damage' • • • must be shown"

In the *Frank Case*, 226 Fed. 906, *supra*, cited by Judge THOMAS, the Circuit Court of Appeals said in addition to the extracts already quoted (p. 911):

"We are not unmindful of Act Cong. Oct. 75, 1914, c. 323, 38 Stat. 737, which in section 16 gives any person, firm, corporation, or association the right to sue for and have injunctive relief in any court of the United States having jurisdiction over the parties against threatened loss or damage by violation of the anti-trust laws. Whether this law could be appealed to by complainants in the present action may be doubted, as it was not passed until after the final decree was rendered in this action, and it has no retroactive effect. Conceding, however, that it might be made applicable to this action, it does not change the rule already established by the decisions of the courts, as the right to sue by a private party is only given to obtain

> injunctive relief against threatened loss or damage. So that, if the law could be applied in the present action, it still remains true that loss or damage to the complainants must be shown."

In the *Ketchum Case* (248 Fed. 106), *supra*, a stockholder in a railroad company brought suit to restrain his corporation from holding certain interests in coal companies alleged to be in violation of the Sherman Anti-trust Act and it was averred in the complaint

> "that by reason of the acts of said railroad company it continually and daily incurs a liability to suits and prosecutions under the laws of the United States, and of having its funds diverted from their proper purposes to the payment of heavy damages, costs, expenses, forfeitures, penalties, and fines, because of the violation of said laws, and also the liability of having its charter revoked and to be dissolved as a corporation and lose its franchises, thereby rendering its shares of capital stock especially its common stock, entirely and utterly worthless, to the great and irreparable damage and loss of the plaintiff and all other common stockholders in said corporation."

But the Circuit Court of Appeals of the Eighth Circuit said:

> "It does not appear from the complaint that the plaintiff has been damaged by the acts of the defendants in any sum whatever. On the contrary, it would seem that the arrangement complained of is very beneficial to the railroad company, and therefore to its stockholders. The plaintiff seems to rely upon the

allegation that the acts of the defendant railroad company if continued will subject it to suits for penalties and forfeitures; but the fear of such a result is greatly lessened when we take into consideration that for about seven years the acts complained of have been committed, and no suits for penalties have yet been commenced. We think it also plainly appears from the complaint that the real trouble which has given rise to the present suit is the quarrel between the Ketchum Coal Company and the railroad company in regard to the shipment of coal, and, while this fact would not bar the plaintiff from instituting this action, it does bear strongly upon the equities alleged to exist in his behalf".

So taking the plaintiff's case as it states it in its brief, that the suit is in its own right as a minority stockholder, still the petition fails to state any special loss or damage to the plaintiff so suing.

The matter of loss and damage should also be considered from another point of view. It appears from the amendment of the petition (Rec. p. 131) that the consolidation agreement was adopted by the directors of the consolidating corporations, including the Lake Shore, on April 29, 1914, and it appears from the original petition (Rec. p. 18) that the plaintiff acquired its Lake Shore stock on June 27, 1914. Upon these facts another case in which it appears that the president of the present corporation, Mr. Venner, was interested—*Continental Securities Co.* v. *Interborough Co.*, 207 Fed. 467—is applicable.

Judge Hough in the District Court (207 Fed. 467, 472) said: "Nothing has been done toward showing that the complainant lost a dollar by

exactly what Mr. Venner knew was going to be done when he caused the stock to be purchased". In the Circuit Court of Appeals upon the appeal (221 Fed. 44, 48) Judge WARD said:

> "Finally the complainant to be entitled to relief, must show that it has suffered special damage. *Thomas* v. *Musical Protective Union*, 121 N.Y. 45, 24 N.E. 24, 8 L.R. A. L75. It bought the Interborough stock with knowledge of the intention to do the things it complains of, and there is no proof that the stock at the time of suit brought or now is worth less than the price it paid. The record seems to show the contrary, viz., that the Interborough Company's dividends have risen from 8% to 10%, and its surplus increased from $1,467,409. to $7,340,348. Complainant does not appear to be injured in any way different from the general public, and therefore should not be allowed to assert the rights of the public."

This plaintiff bought its Lake Shore stock after the consolidation agreement had been entered into; made the purchase with its eyes wide open, and there are no averments in the petition from beginning to end tending to show that the pecuniary value of its shares was likely to be diminished by the consolidation. What real threatened injury to the plaintiff itself is averred? Not that it will actually lose anything if everything it charges as unlawful be permitted. Not that it has actually lost anything. Mere bald and general statements that "penalties and forfeitures will arise and take place against defendant railroad companies and their properties" appear but they are quite insufficient to show any real loss to the plaintiff.

It should be added here that while we have thus far considered the matter of loss and damage as relating especially to the plaintiff's case as based upon the Clayton Act the same principles control when the case is regarded as based upon the Sherman law itself or upon general principles. Special damage to the plaintiff must be shown and it is not averred.

There is nothing in the *Geddes* decision contrary to the contentions which we have made. That suit was instituted in the District Court of the United States, not a State court, and so there was no question of jurisdiction involved. Besides there were allegations of direct, specific and irreparable loss to the plaintiffs themselves.

(3) *The Sherman and Clayton Acts are prospective in their operation.*

There is another objection to the petition as based upon the Clayton Act. The third prayer for relief reads as follows:

> "That the Lake Shore Company be enjoined from making any consolidation whatsoever with the New York Central Company unless and until it shall first have been divested of its control of the Big Four, the Nickel Plate, the Lake Erie, and the Ohio Central Companies, and until the New York Central Company shall have been divested of the control of the Michigan Central Company and that of the Western Transit Company."

Confining ourselves to the stocks of which the plaintiff seeks to divest the Lake Shore it appears from the petition that the Lake Shore acquired its control of the New York, Chicago and St.

Louis Railroad Company—the Nickel Plate—in 1887; that at the date of the petition it had "for many years" owned a controlling interest in the Cleveland, Cincinnati, Chicago & St. Louis Railway Company—the Big Four—and in Lake Erie and Western Railroad Company and the Toledo and Ohio Central Railway Company.

It thus appears that all the stockholdings which the plaintiff attacks were acquired long before the enactment of the Clayton law and, in the case of the Nickel Plate, before the passage of the Sherman law.

The Sherman law is prospective in its effect and operation and does not invade vested property rights.

In *Pearsall* v. *Great Northern Ry. Co.*, 161 U. S. 646, the Supreme Court, in speaking of a State statute which forbade the consolidation or common control of parallel or competing lines, said (p. 659):

> "A different question would have been presented if any such contract had been made and carried into effect, before the act of 1874 was passd, since it might be claimed that the rights of the parties had become vested, within the meaning of section 17 of the original charter of the Minnesota and St. Cloud Railroad, and as such could not be destroyed or impaired by subsequent legislation impairing the obligation of contracts. * * *
>
> (p. 673): "A vested right is defined by Fearne, in his work upon Contingent Remainders, as 'an immediate fixed right of present or future enjoyment or a present fixed right of future enjoyment.' * * *

> "As applied to the railroad corporations, it may reasonably be contended that the term extends to all rights of property acquired by executed contracts, as well as to all such as are necessary to the full and complete enjoyment of the original grant, or of property legally acquired subsequent to such grant".

In the *Standard Oil Case*, 221 U. S. 1, Chief Justice WHITE said (p. 46):

> "The overruling of the exceptions taken to so much of the bill as counted upon facts occurring prior to the passage of the Anti-trust Act,—whatever may be the view as an original question of the duty to restrict the conroversy to a much narrower area than that propounded by the bill,—we think by no possibility in the present stage of the case can the action of the court be treated as prejudicial error justifying reversal. We say this because the court, as we shall do, gave no weight to the testimony adduced under the averments complained of except in so far as it tended to throw light upon the acts done after the passage of the Anti-trust Act and the results of which it was charged were being participated in and enjoyed by the alleged combination at the time of the filing of the bill."

The Clayton Act is also prospective in its operation. Thus in the *Venner case*, 177 A. D. (N. Y.) 296, already discussed, Judge THOMAS said:

> "The plaintiff may not maintain the bill under the Clayton Act * * * * * * (3) because the Clayton Act does not authorize him to file a bill to divest property acquired be-

fore it went into effect, and as to some of the stock before the Sherman law was passed."

Later in the opinion Judge THOMAS said:

"It is not to be assumed that Congress, by the anti-trust laws, intended to strip persons of their property or to divest stockholders of rights incident to ownership. In *DeKoven* v. *Lake Shore & M. S. Ry. Co.* (216 Fed. 955), this consolidation as proposed was involved, and the learned judge, upon a motion for a preliminary injunction, decided that minority stockholders were 'not entitled to a preliminary injunction to restrain its consolidation with another company on the alleged ground that it would be illegal as in restraint of competition and in violation of the anti-trust act, where, through ownership of a majority of the stock of one company by the other, they were and had been for a number of years, as completely under one management and control as though consolidated, and during all such time the United States, had acquiesced therein.'"

The decision in the *Trans Missouri Freight Assn. Case*, 166 U. S. 290, is, we submit, not in conflict with our contention.

All that that case holds is that where a contract, essentially executory, is entered into contemplating the future performance of a large number of transactions, and in the meantime a statute is enacted which forbids such transactions, the plea that the general contract antedated the statute does not avail. While a traffic contract, which was lawful when first entered into, might thus be condemned in so far as it remained executory, a wholly different situation is presented

when we are dealing with an *executed* contract. In such a case the element of continuing combination or conspiracy is absent and all the situations in this case were based upon executed contracts.

(4) *Section 7 of the Clayton Act does not help the plaintiff.*

Section 7 of the Clayton Act which the plaintiff prints in its brief affords no support for its contentions. That section is prospective in its application. It provides expressly that

> "Nothing contained in this section shall be held to affect or impair any right heretofore lawfully acquired * * *".

The plaintiff undertakes to show that the new consolidated corporation acquired (manifestly after the commencement of this suit) the capital stock of different corporations in violation of this section. But there is nothing in the petition to support the claim. The consolidation embraced no competing railroads. And if the consolidated company acquired any shares of stock there is nothing whatever to show that such acquisition substantially lessened competition.

Besides, Section 11 of the Clayton Act vests authority in the Interstate Commerce Commission to enforce compliance with Section 7 of that Act when applicable to common carriers, and Section 16 provides that no suit shall be brought in respect of any matter within the jurisdiction of the Commission.

VIII.

The petition fails to state a case showing any violation of the federal anti-trust statutes even if the plaintiff could have sued in the State court to restrain it.

In the preceding points of this brief we have sought to show that the plaintiff as a private person, whether as a stockholder or in other capacity, could not sue either upon the Sherman law, the Clayton Act or general principles to restrain the proposed consolidation upon the ground that it was in violation of the federal anti-trust statute. If the Court sustain our contentions the present point is not called for. Assuming, however, that the Court does not accept our argument, still we contend that the portion of the petition purporting to charge violations of the federal anti-trust statute was properly dismissed because the petition fails to state facts sufficient to show any violation thereof.

It is necessary then to examine the petition and ascertain just what it does contain after striking out the matters affecting the New York Central as to which the Circuit Court of Appeals held it was an indispensable party. As we have already pointed out, the plaintiff makes no claim of error in that matter and in its brief (p. 57) under the heading *"The Alleged Lack of an Indispensable Party"* says that "The Circuit Court of Appeal's first opinion contained the following correct recital and conclusion on this point". And then the plaintiff quotes extracts from the opinion of the Circuit Court of Appeals, which are entirely

consistent with our present claim. The substance of the decision, however, is stated at the conclusion of the opinion upon the point as follows (Rec. 123):

> "Since, however, the New York Central Company was not an indispensable party to so much of the original petition as sought an injunction against the Lake Shore Company from entering into the consolidation, the appointment of a receiver of the stocks owned by it in its subsidiary companies, and decrees for their management and disposition, it follows that in so far as the degree of dismissal related to those matters and awarded all unadjudged costs against the plaintiff, it was not warranted merely on account of the absence of that company, and unless sustainable upon other grounds, must be reversed."

The decision thus left in the case the charges that the proposed consolidation was unlawful as to the plaintiff as a Lake Shore stockholder but eliminated all charges of previous violations of the federal anti-trust statute by the New York Central, such as the acquisition of controlling stock interests in the Michigan Central and the Lake Shore. Manifestly as to these matters the New York Central was an indispensable party.

The petition starts by naming the New York Central, the Lake Shore and a large number of subsidiary railroad companies, giving their capitalization and stock ownership. It also describes the location of the New York Central, the West Shore, the Michigan Central, the Lake Shore, the Nickel Plate, the Big Four and other railroads. It then alleges that the New York Central conceived a plan of acquiring the control of these roads in the course of "carrying out such illegal

and wrongful plan for the restraining of inter and intra-state commerce". All through the petition the allegations of violations of the federal anti-trust laws by transactions prior to the proposed consolidation relate to acts of the New York Central. Except so far as the consolidation itself is concerned it cannot be said that there were any violations of the federal anti-trust laws alleged on the part of the Lake Shore. Its acts alleged are always interwoven with those of the New York Central and cannot be separated.

Another large portion of the petition has from the beginning also been out. The Read Committee, concerning which there are so many allegations, was never served nor attempted to be served. Of course, the members of such Committee were indispensable parties as to the matters relating to it and were held to be such by the decision of the Circuit Court of Appeals, and no error is predicated upon such decision.

All there is in the petition which can be said to charge any violation of the federal anti-trust laws as to the Lake Shore is the proposed consolidation. Assuming, therefore, for the sake of the argument that the plaintiff as a stockholder of the Lake Shore has a standing to sue to restrain the proposed consolidation upon the ground that it would constitute a violation of the federal anti-trust statute the question at once arises whether such consolidation will constitute such a violation.

The petition avers (Rec. p. 17) that the parties to the proposed consolidation were the New York Central, the Lake Shore and nine other companies. These nine companies are not named in the petition, although their names appear in the proposed supplemental petition, and there is no

allegation that they were, any of them, competing lines with either the Lake Shore or the New York Central. Apparently they were subsidiary companies of the two large consolidating corporations. The Michigan Central was not a party to the consolidation.

It cannot be too clearly borne in mind that the railroads of the New York Central and those of the Lake Shore were not competing lines. They were connecting lines; connecting at Buffalo. The consolidation left previous conditions as it found them. It accomplished nothing novel with respect to any competing corporations. By no possibility can it be said that it was in restraint of interstate commerce.

It seems unnecessary to examine this point further or to consider the applicability of the decisions of this Court in the *Northern Securities Case*, 193 U. S. 197, or *Union Pacific Case*, 226 U. S. 61. referred to by the plaintiff. In those cases the lines involved were competing. In the present case they are, so far as the parties to the consolidation are concerned, connecting. Of course if the petition had stood with the New York Central in the case and with all the averments affecting it standing, it would undoubtedly have been necessary to consider whether the case came within the authorities cited. But with the New York Central out the situation was entirely different. Moreover in the *Venner* case already refered to, 177 A. D. 299 (affirmed 226 N. Y. 583, certiorari denied 249 U. S. 607) everything that appeared in the present petition in its original state was in the case upon the proofs and Judge THOMAS made a most complete examination of the laws and facts; considered the cases referred to

and other cases in this Court and in a most elaborate opinion reached the conclusion that no violations of the federal anti-trust laws were established.

Although it may involve repetition, we again point out that there is nothing in the petition outside the allegations as to the proposed consolidation, which could possibly afford a basis for a suit by a Lake Shore stockholder on the ground that his corporation was violating the federal anti-trust statute. There is, it is true, the averment (Rec. p. 4) that in 1887 the Lake Shore acquired a controlling interest in the New York, Chicago and St. Louis Railroad Company (the "Nickel Plate") and dominated its affairs. The location of the railroads of the Lake Shore and of the Nickel Plate are also described (Rec. p. 6). It is also stated (Rec. p. 8) that the acquisition by the New York Central of the control of the Lake Shore was unlawful, among other things, "in that the Lake Shore at the time the New York Central obtained control thereof owned the controlling intrest in the stock of the Nickel Plate Company," the road of which is then said to be parallel to and particularly competing with that of the Lake Shore. But this charges unlawful acts on the part of the New York Central which are out of the case; there are no direct allegations as to the acts of the Lake Shore. The petition wholly fails to state facts as to the nature and extent of competition between the Lake Shore and the Nickel Plate; the conditions under which a controlling interest was obtained; the object thereof, and other facts and circumstances necessary to state a cause of action for violation of the federal anti-trust statute. Besides it appears from the face of the petition that the control of the Nickel

Plate was obtained by the Lake Shore in 1887 and before the Sherman Act was passed. And, of course, all the allegations of the peetition concerning the Lake Shore and the Nickel Plate show an existing status and are irrevelant as to any act of the Lake Shore in entering the consolidation.

In this connection it should, we think, be added that while we consider the petition as it stands, yet the question whether the holding by the Lake Shore of controlling stock interests in the Nickel Plate is now a moot one, the consolidated company having disposed of the Nickel Plate stock several years ago. Even if the Court should think that the averments covering the Nickel Plate have substance we respectfully suggest that the case should not be remanded for that reason when it may be ascertained by some appropriate proceeding that the question with respect to that corporation has become moot.

IX.

The petition fails to state a case showing violations of State constitutional and statutory provisions of which the State Court was required to take cognizance.

(1) *The allegations of the petition concerning violations of State laws are too vague and uncertain to state a cause of action.*

The petition in one portion states that the acquisition and holding by the New York Central of the control of the Lake Shore was in violation of certain State con-

stitutional and statutory provisions. But that part of the petition directly affected the rights and property interests of the New York Central and by the decision of the Circuit Court of Appeals, was eliminated from the case. The same is true concerning the allegations regarding the acquisition of control by the New York Central of the Michigan Central and other corporations.

Turning then to the portions of the petition which were permitted to stand as against the Lake Shore the allegations concerning violations of State constitutional and statutory provisions are the following (Rec. p. 20):

> "Plaintiff says that said proposed consolidation of the Lake Shore Company with the New York Central Company, constituting as it will a consolidation of companies owning and controlling several parallel and competing lines engaged in commerce, both inter- and intrastate, and with foreign nations, is a violation of the public policies of the United States and of the states of Illinois, Indiana, Michigan, Ohio, Pennsylvania and New York, and of the common law of those states; a violation of the Federal so-called Sherman Anti-trust Act and the Clayton Act so-called (said last named act being an Act of Congress approved October 15, 1914) and other Federal laws; a violation of the Constitutions of Illinois, Michigan and Pennsylvania; and a violation of the various laws of the United States and of the states aforesaid providing against and making illegal, consolidations of, and the control of, parallel and competing lines of railroad, and all combinations in restraint of trade and commerce through mergers, stock ownership, or unified control accomplished in such or other ways, and

establishing penalties and forfeitures therefor."

It seems manifest that these averments are mere statements of conclusions and, besides, are altogether too general, sweeping and indefinite to state a cause of action. It is not enough to charge that the proposed consolidation would be in violation of State constitutional and statutory provisions without indicating them. The defendant ought not to be obliged to guess what statutes the plaintiff refers to and to answer entirely in the dark. The State statutes and constitutional provisions which within the range of possibility might be involved are, however, discussed in Judge Thomas' opinion in the *Venner Case* (177 A. D. 299) already referred to. That opinion shows that the proposed consolidation was not in violation of any of such provisions. The Court held broadly that "neither the consolidation nor the previous relation offends the laws of the several States wherein the new company is incorporated"; being the States named in the present petition.

The situation obviously is that the allegations concerning violations of State laws were a mere incident and makeweight. The real case which the plaintiff set up was one directly affecting the New York Central and charging violations of the federal anti-trust statutes. With the New York Central out of the case and the charge of federal violations eliminated, the allegations remaining in the petition are, we submit, altogether too indefinite and uncertain to state a cause of action.

As said by the Circuit Court of Appeals in its second opinion (Rec. p. 145) where a private suitor with a minimum of ponderable interest

and in the absence of action by public authorities makes charges of violation of state laws imperfections in pleadings which might be overlooked in a mere private controversy ought not to be disregarded; such a plaintiff should be held to the standard of pointing out in his pleadings at least with a considerable degree of precision the laws which he charges have been violated and the respects in which they have been violated.

(2) *The Ohio Court in which this suit was brought was not required to pass upon violations of penal anti-trust statutes of other states.*

The anti-trust and anti-monopoly statutes of the different states are generally penal in their nature and it is, of course, settled that penal statutes have no extra territorial operation and that the courts of one state will not enforce the penal laws of another (*Huntington* v. *Attrill*, 146 U. S. 657, 666). Consequently, the Ohio court in which this suit was brought was not obliged to consider any charges that the Lake Shore had violated any of the anti-trust laws of other states than Ohio. Moreover, comity did not require that it assume jurisdiction to determine whether such violations had taken place. The petition avers, broadly and vaguely, that the anti-trust statutes of different states had been violated and if the Ohio court (the removal did not alter the legal situation) had held that such violations had occurred and the courts of the states where laws were questioned had subsequently held to the contrary the utmost judicial confusion would have resulted.

Notwithstanding these objections we proceed to examine the charges of violations of the statutory

and constitutional provisions which the plaintiff refers to in its brief in this Court.

OHIO.

As already pointed out, the averments in the petition in its original state that the acquisition in 1898 of the control of the Lake Shore and Michigan Central by the New York Central and its continuance until this suit was commenced, constituted violations of the Ohio anti-trust act are out of the case. That was a matter which directly affected the New York Central and as the law already pointed out no assignment of error is based upon the dismissal of the portion of the petition relating thereto.

Accepting the case, however, upon the theory that the plaintiff as a stockholder of the Lake Shore is seeking to enjoin his corporation from entering into a consolidation in violation of the laws of Ohio we find no facts showing any such violation.

The plaintiff refers to the General Code of Ohio (sec. 9027) which provides that:

> "A railroad company formed by the consolidation of a company or companies of this state, with a company or companies of another state or states, may make a further consolidation with a company or companies of another state or states owning continuous, connected, but not parallel or competing lines."

But as we have heretofore pointed out, the New York Central and the Lake Shore were connecting and continuous and not parallel or competing lines. Nor were any of the other railroads,

parties to the proposed consolidation, parallel or competing lines. So far as they extended into or through the State of Ohio they were connecting lines. Consequently, it is manifest that there was no violation of the Ohio statutory provision referred to against the consolidation of competing and parallel lines. The consolidation did not change the status so far as that statute was concerned.

The plaintiff, however, apparently does not contend that the proposed consolidation would violate any Ohio statute. Its brief (pp. 76-84) deals entirely with certain pre-existing relations. It is confined to the contention that there was parallelism in the state of Ohio "shown by the map" (1) between the Lake Shore and the "Nickel Plate" (the New York, Chicago and St. Louis Railroad); (2) between the Lake Erie and Western Railway and the "Big Four" (Cleveland, Cincinnati, Chicago and St. Louis Railroad) and (3) between two roads owned by the Toledo and Ohio Central Railway.

But while this Court may look at the map and take judicial notice of the fact that the railroads are parallel that does not dispense with the necessity of stating a cause of action in the petition. If a petition avers that railroads which are parallel or competing have combined in violation of a designated statute a court may take proof by judicial notice of certain pleaded facts but they must be pleaded.

In the present case there are no substantial allegations in the petition as to the existence of parallelism or competition and no averments as to any Ohio statutes violated. It is true—as already stated—that the capitalization of the

Nickel Plate is stated and that the Lake Shore is alleged to control it. The capitalization of the Lake Erie and Western is also stated and the Lake Shore is alleged to own a majority of the shares of that corporation. The capitalization of the "Big Four" is likewise stated and the Lake Shore is alleged to control the corporation. The capitalization of the Toledo and Ohio Central is also stated and the Lake Shore is alleged to control it. All of which amounts to this—that these corporations were subsidiaries of the Lake Shore (Rec. p. 4).

The railroads of the above named corporations are also described in the petition in very general terms (Rec. p. 6). There are, however, no allegations that they are parallel or competing lines except in the case of the Nickel Plate (Rec. p. 8). And while this Court may take judicial notice of the location of railroads and, perhaps, of the existence of competition a case showing a violation of some statute must at least be *stated*.

Moreover, with respect to judicial notice we think that the matters which the Court will take notice of demonstrate that Judge THOMAS was right in holding in the *Venner Case*, 177 A. D. (N. Y.) 296, that taken in their entirety the various Ohio railroads supplied the transportation needs of divers sections of the State and were feeders and distributors to the main line extending between New York and Chicago and that any parallelism was incidental, unimportant and quite insufficient to constitute a violation of any statute.

The relevancy of the Ohio cases cited by the plaintiff is not apparent. *State* v. *Vanderbilt*, 37 Ohio St. 590, is a case construing the Ohio con-

solidation statute but it has no bearing upon the present case. As already pointed out the railroads of the parties to this proposed consolidation—the Lake Shore and the New York Central—connect at Buffalo and, of course, are not and never could have been parallel or competing in Ohio. The other cases holding that certain railroad consolidations and combinations were illegal are equally irrelevant. It is not claimed that any parties to the proposed consolidation owned competing lines in that State. The cases also have no bearing upon the question of the alleged parallelism existing prior to the consolidation between the roads mentioned in the plaintiff's brief. Such parallelism was merely incidental and, besides, the facts alleged are altogether too meagre to state cause of action.

Not only is the petition silent as to any Ohio statute which is claimed to be violated but the plaintiff's brief points out only two statutory provisions. The first provision is the consolidation statute (Ohio Code, section 9027) already considered. This, as already shown, has no application as there was no consolidation proposed of parallel or competing lines in Ohio.

The second statute pointed out is section 8683 of the Ohio Code providing as follows:

> "A private corporation may also purchase, or otherwise acquire, and hold shares of stock in other kindred but not competing private corporations, domestic or foreign. This shall not authorize the formation of a trust or combination for the purpose of restricting trade or competition."

Manifestly the allegations of the petition as to the existence of parallelism between certain

minor roads are altogether too meagre and indefinite to establish the existence of "a trust or combination for the purpose of restricting trade or competition" or to show the holding of stock in competing corporations. To state a violation of the anti-trust laws of Ohio facts and not mere conclusions must be pleaded. Moreover, there are no conclusions pleaded regarding the application of this particular statute.

With respect to the Nickel Plate it does not appear that the statute last referred to was in force in 1887 when—as the petition avers—the Lake Shore acquired its holdings. And with respect to the Nickel Plate matter attention is directed to the following provision of the Ohio General Code (Sec. 12340).

> "Nothing in this chapter contained authorizes an action against a corporation for forfeiture of charter, unless it be commenced within five years after the act complained of was done or committed; nor shall an action be brought against a corporation for the exercise of a power or franchise under its charter which it has used and exercised for a term of twenty years; nor shall an action be brought against an officer to oust him from his office, unless within three years after the cause of such ouster, or the right to hold the office, arose".

Now, as already stated, if there were any parallelism between the Lake Shore and the Nickel Plate it went back to 1887. But it does not appear that at any time within twenty years the state authorities or anyone else within the State of Ohio complained, and the plaintiff is consequently barred by the statute of limitations.

This statute, as will be observed, is to be distinguished from a statute simply limiting the time within which action may be brought. It is a statute which qualifies the right and its observance is a necessary condition precedent to any suit. Consequently, by reason of the failure of anyone to attack the title of the Lake Shore to the Nickel Plate stock during this long period rights accrued which became vested and beyond disturbance. Besides, as already stated, the Nickel Plate question is moot.

ILLINOIS.

The plaintiff's brief as purporting to show violations of the laws of Illinois proceeds along the same lines as when attempting to show violations of the Ohio statutes.

It says merely that the map shows parallelism. It points out no allegation in the petition stating such parallelism or any potentially competing conditions.

Moreover, the roads referred to in the brief were not parties to the proposed consolidation. The most that can be said is that the Lake Shore owned controlling interests in some of the roads running into Illinois and said to be parallel. It had no interest in the Michigan Central.

But the mere fact that the Lake Shore had stock interests in these roads did not constitute a consolidation in violation of such a constitutional provision as the one in Illinois. The mere fact that one corporation has obtained control of the stock of another corporation is not, in itself, sufficient to show a consolidation of such corporations.

Jessup v. *Illinois Central R. Co.*, 36 Fed. 735.

Chase v. *Michigan Telephone Co.*, 121 Mich. 634.

See also *Pullman Car Co.* v. *Missouri Pac. R. Co.*, 115 U. S. 587.

And while the courts have sometimes held that extraordinary arrangements although not amounting to a technical consolidation may violate constitutional and statutory provisions against the consolidation of competing roads, as for instance *Pearsall* v. *Great Northern R. Co.*, 161 U. S. 671, nothing of the kind is alleged in this petition or stated in the plaintiff's brief.

The case of *East St. Louis Ry. Co.* v. *Jaris*, 82 Fed. 735, cited in the plaintiff's brief, has no bearing upon the case presented here and it is probably unnecessary to examine it. It may well be doubted, however, whether its conclusion that a railroad lease is the equivalent of a consolidation is well founded. In the case of a lease there are two estates and the interests of lessor and lessee are to an extent antagonistic. In the case of a consolidation there is a union of interests. See *State* v. *Montana R. Co.*, 21 Mont. 243; *Mills* v. *Central R. Co.*, 41 N. J. Eq. 7; *State* v. *Vanderbilt*, 37 Ohio St. 638.

Moreover, upon the facts there is no foundation for any claim that there has been a substantial if not a technical consolidation in Illinois. About all that could be said is that the westerly portion of the railroad of the Lake Erie and Western and the westerly extension of the Big Four converge as they approach Peoria, Illinois. These corporations, as we have said, are not parties to the proposed consolidation and if they

were they would be in no substantial sense parallel or competing lines. The segments in question are unrelated portions of two distinct roads. The only other basis for any such claim would arise from the fact that in approaching Chicago both the Lake Shore and the Nickel Plate skirt the southwesterly shore of Lake Michigan in Illinois until Chicago is reached. But if both roads reach Chicago at all it is necessary to skirt the shore of Lake Michigan and there is an enforced geographial parallelism for a few miles between the Indiana state line and Chicago.

PENNSYLVANIA.

The plaintiff calls attention in its brief to Article 17, Sec. 4, of the constitution of Pennsylvania, which provides:

> "No railroad, canal or other corporation, or the lessees, purchasers or managers of any railroad or canal corporation shall consolidate the stock, property or franchises of such corporation, with, or lease, or purchase the works or franchises of, or in any way control, any other railroad or canal corporation, owning or having under its control a parallel or competing line; nor shall any officer of such railroad or canal corporation act as an officer of any other railroad or canal corporation owning or having the control of a parallel or competing line; and the question whether railroads or canals are parallel or competing lines shall, when demanded by the complainant, be decided by a jury, as in other civil cases."

In 1907—as also pointed out by the plaintiff—the Legislature of Pennsylvania enacted this con-

stitutional provision as a statute in the same language.

The objection that this proposed consolidation was in violation of these provisions was raised before the Public Service Commission of Pennsylvania upon the same ground stated in the plaintiff's brief, viz: that the line of the Nickel Plate was parallel with that of the Lake Shore along the south shore of Lake Erie in Pennsylvania. The Commission, however, said (2 Pa. Corp. Rep. 1915, p. 381):

> "It will be observed that the proposed consolidation is not within the language of the prohibition in the constitution. No corporation here consolidates with or purchases the works or franchises of another corporation owning or controlling a competing or parallel line. The New York Central & Hudson River Railroad does not compete with and is not parallel with, so far as the evidence discloses, either the Lake Shore or the Nickel Plate. It may be that the ownership by the Lake Shore of the stock of the Nickel Plate brings it within the spirit of the prohibition and the intention, but apparently it is not included within the terms used. It is not deemed necessary to reach a conclusion upon either one of these two doubtful propositions. Assuming that the purchase of the Nickel Plate stock by the Lake Shore was unlawful, that purchase is in no way affected by the merger. The approval of the merger is not an approval of the purchase, and its legality may be questioned at any time in a proper manner before a proper tribunal. The stock remains in precisely the same situation after such merger as it was before."

As stated by the Commission the consolidation

did not affect the situation as to the Lake Shore holdings of Nickel Plate stock. Conversely, the matter of the legality or illegality of such holdings did not affect the lawfulness of the consolidation.

Moreover, upon principles already pointed out, the Pennsylvania constitutional and statutory provisions cannot be construed as having extra territorial application. Obviously the State of Pennsylvania was legislating regarding conditions within its borders. The provisions concerning parallel and competing lines apply to railroad companies within the State; they do not apply to foreign corporations. Furthermore, a reasonable interpretation of such provisions requires that they should be construed as applying only to railroads whose terminii are within the State; a parallel or competing line evidently refers to a railroad in its entirety, not to an arbitrary segment without either terminus in the State as in the case of both the Nickel Plate and the Lake Shore.

Judge Thomas in his opinion in the *Venner Case*, 177 App. Div. (N. Y.) 296, 344, discussed at length the origin of the Nickel Plate railroad and the motive which probably lay behind its acquisition by the Lake Shore so many years ago. As appears by the petition the Lake Shore acquired its holdings in 1887 and there is nothing to indicate that it was not separately and independently operated thereafter. Furthermore, as already stated, the Nickel Plate holdings have now been disposed of.

Besides these considerations showing that no violation of Pennsylvania constitutional or statutory provisions appears, it will be noted that the

provisions for jury trials clearly indicate that they were not intended to have extra territorial application.

Finally, it should be added that after the long lapse of time since the Lake Shore acquired the Nickel Plate stock the plaintiff and undoubtedly the public authorities would be barred in Pennsylvania by laches from enforcing the constitutional and statutory provisions in question.

Ashhurst's Appeal, 60 Pa. St., 290;
Watt's Appeal, 78 Pa. St. 370;
Land Company v. *Weidner*, 169 Pa. St. 359;
Northern Cen. Ry. Co. v. *Walworth*, 193 Pa. St. 207;
Church v. *Winton*, 196 Pa. St. 107;
Taylor v. *Coggins*, 244 Pa. St. 228.

Certainly this Court in respect of alleged Pennsylvania violations should apply the same bar.

MICHIGAN.

The General Railroad Law of Michigan provides as follows (Comp. Laws 1897, Section 6254):

> "Any railroad in this state forming a continuous or connecting line of railroad with any other railroad company, may consolidate with such other company, either in or out of the state or partly within or partly without this state, into a single corporation: Provided, That no such companies owning parallel or competing lines shall be permitted to consolidate themselves into one corporation."

The restriction in this statute is in harmony

with Section 8, Article 12, of the Michigan constitution which provides that no railroad corporation shall consolidate its stock, property or franchise with any other railroad corporation owning parallel or competing lines. It does not appear from the petition, however, that any of the railroads about to enter the consolidation were either parallel or competing within the State of Michigan. The Michigan Central was and is a separate corporation and was not a party to the consolidation.

Moreover, the brief—following the same lines as in the cases of Ohio, Illinois and Pennsylvania—adds nothing of substance to the petition. It says merely that parallelism in Michigan is shown by the map between a road of the Lake Shore and a road of the Michigan Central running between Detroit and Toledo. But the Michigan Central was, as already stated, not a party to the consolidation and was not controlled by the Lake Shore. Whatever control existed in the matter prior to consolidation was in the New York Central and is not in this case.

INDIANA.

There are no statutes or constitutional provisions in Indiana against the consolidation of parallel and competing railroads.

The plaintiff in its brief, however, attempts to state some rule of public policy. Whatever that rule may be the petition fails to state any case under it, nor are any facts stated in its brief.

Assuming that by looking at the map it can be seen that parallelism exists between certain segments of railroads owned by certain of the corporations referred to in the petition, that does

not establish any violation of the public policy of Indiana to prevent the creation of monopolies and to foster fair competition.

X.

The contention that the acquisition by the New York Central of stocks in competing railroads amounted to a virtual consolidation is not available to the plaintiff; if it were it would be without foundation.

As has already been pointed out, the Lake Shore filed a motion to dismiss the petition for want of an indispensable party after the attempted service upon the New York Central had been set aside and such motion was granted by the District Court. Upon the first appeal, however, the Circuit Court of Appeals held that the motion to dismiss having been directed to the whole petition was too broad and so by its decision it struck out those portions of the petition which charged the New York Central with unlawful acts, leaving in the petition only matters directly affecting the Lake Shore and with respect to which the plaintiff could sue as a stockholder of that corporation.

The action of the Circuit Court above referred to, as has already been stated, is not questioned by the plaintiff in this Court. Consequently, the contention made by the plaintiff in the last point of its brief that the acquisition by the New York Central of stocks in competing railroads constituted a virtual consolidation is not open to it. Manifestly the New York Central was an indispensable party to the charge that it had acquired

and held in violation of law the shares of the Michigan Central and other corporations.

And even if the New York Central were in the case the facts stated in the petition are entirely insufficient to state a cause of action upon which the plaintiff can sue. If our contention with respect to the federal anti-trust statutes be well founded (1) no violation of those statutes is stated and (2) if stated the plaintiff has no standing to sue. And if our contentions regarding the applicability of the State statutory provisions be well founded the petition likewise states no case in that aspect. Moreover, the opinion of Judge THOMAS in the *Venner Case*, 177 A.D. 296, considers all the questions which the plantiff raises in a case in which all parties were joined and holds that the acquisition by the New York Central of the various stocks was not unlawful.

CONCLUSION.

The decree appealed from should be affirmed with costs.

Respectfully submitted,

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